No. 82-1899

IN THE

Supreme Court of the United States

October Term, 1982

TRANS WORLD AIRLINES, INC.,

Appellant,

v.

THE NEW YORK STATE HUMAN RIGHTS APPEAL BOARD and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Appellees.

MOTION TO DISMISS OR AFFIRM

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Restatement of Question Presented

Has TWA presented a substantial federal question under the Commerce Clause, the Supremacy Clause or the Due Process Clause of the Fourteenth Amendment?

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MOTION TO DISMISS OR AFFIRM

Appellee New York State Division of Human Rights moves the Court to dismiss this appeal or affirm summarily the several orders below, because TWA has presented no substantial federal question.

Statutes Involved

1. 28 U.S.C. § 1257 provides in relevant part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being

repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

2. The provisions of the Human Rights Law, N.Y. Exec. Law Art. 15 (McKinney's 1972 & Supp.), relevant to the question TWA seeks to raise are set forth in the Jurisdictional Statement at 6.

3. The constitutional and statutory provisions on which TWA relies are set forth in the Jurisdictional Statement at 3ff.

Statement of the Case

The several orders on appeal to this Court, see Jurisdictional Statement at 1n, (1) uphold administrative orders issued by the appellees finding that TWA discriminated against its female flight attendants because of sex, in violation of the Human Rights Law, by compelling them to take unpaid leave immediately upon notification of pregnancy, 90 App. Div.2d 699 (2nd Dept. 1982) (30a)*; (2) dismiss TWA's appeal as of right to the New York Court of Appeals on the ground that no substantial constitutional question was directly involved, 58 N.Y.2d 778 (1983) (38a), and (3) deny TWA's subsequent motion for reargument or leave to appeal, 58 N.Y.2d 970 (1983) (46a).

The first administrative order was issued by appellee New York State Division of Human Rights (13a) after written notice and extensive public hearings. The second administrative order (20a) was issued by appellee New York State Human Rights Appeal Board after notice, briefing and oral argument.

* Page numbers followed by "a" refer to the Appendix to the Jurisdictional Statement.

ARGUMENT

TWA has not raised a substantial federal question.

1. *Commerce Clause; Supremacy Clause.* TWA argues that because Congress has occupied the field of air safety, the Human Rights Law is invalid under the Commerce Clause, U.S. Const. Art. I § 8, and preempted by the Federal Aviation Act, 49 U.S.C. § 1508(a) (1976), and cannot be applied to protect pregnant flight attendants from discrimination.

The argument is no longer tenable. This Court has rejected the view that application to air carriers of state laws against discrimination is invalid under the Commerce Clause or the Federal Aviation Act. *Colorado Anti-Discrimination Comm.* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963). The question has therefore been settled and now lacks substance.

Moreover, the question may now be moot. Congress has recognized and preserved state laws against discrimination by requiring recourse to administrative remedies thereunder. 42 U.S.C. §§ 2000e-5, 2000e-7; see § 2000h-4; see also *Shaw* v. *Delta Air Lines, Inc.*, —— U.S. ——, 51 U.S.L.W. 4968, 4972 (1983) and cases there cited. As amended by the Pregnancy Discrimination Act, P.L. 95-555, 42 U.S.C. § 2000e-(k), effective October 31, 1978, before issuance of the earliest order in this case, Title VII of the Civil Rights Act of 1964 imposes substantially the same prohibitions and requirements as the Human Rights Law. Neither the Human Rights Law nor any order in this case demands more of TWA than presently applicable federal law, which in New York is enforceable initially by proceedings under

the Human Rights Law. See 42 U.S.C. § 2000e-5; see also 29 C.F.R. § 1604.10 and Appendix ¶¶ 6, 8 (1979).

2. *Due Process Clause.* TWA argues that despite notice and extensive hearings, including opportunity to call, examine and cross-examine witnesses, submit evidence and make written and oral argument, see N.Y. Exec. Law § 297.4; 9 N.Y.C.R.R. § 465.10 (1977), it was deprived of due process of law, U.S. Const. Amend. XIV, because none of the orders in this case, administrative or judicial, discussed its evidence or arguments. Jurisdictional Statement at 27ff.

Although the Human Rights Law requires only findings of fact, HRL § 297.4(c), the Division's order added a short opinion addressing TWA's main arguments succinctly (15a-16a). The order meets and exceeds the statutory standard, refuting the claim that due process was somehow violated.

The mere fact that the Division's trial attorney did not file a brief in opposition neither suggests TWA's evidence or arguments were overlooked, nor exalts those arguments into binding rules of law.

Before the date of the order of the Division in this case, a similar order in a similar case had been judicially sustained. *United Air Lines, Inc.* v. *State Human Rights Appeal Board,* 61 App. Div.2d 1010 (2nd Dept.), *appeal denied,* 44 N.Y.2d 648, *cert. denied,* 439 U.S. 982 (1978). The Division did not deprive TWA of due process of law by applying that precedent here.

Conclusion

The appeal should be dismissed or the decisions below summarily affirmed.

Dated: New York, N.Y.
July 22, 1983

Respectfully submitted,

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